

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 4, 2004 Session

STATE OF TENNESSEE v. TRAVIS THOMPSON, et al.

Direct Appeal from the Chancery Court for Davidson County
No. 99-2003-III Hon. Ellen Hobbs Lyle, Chancellor

No. M2003-02636-COA-R3-CV - Filed February 11, 2005

On remand of the first appeal of this case, the Trial Court awarded additional attorney's fees, pursuant to Tenn. Code Ann. § 29-37-101 *et seq.*, and post-judgment interest pursuant to Tenn. Code Ann. § 47-14-122. On appeal, we hold the statutory cap set forth in Tenn. Code Ann. § 29-37-101(a)(1) was reached by the initial Judgment. Consequently, the awards made on remand are reversed..

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Reversed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J. M.S., and WILLIAM BRYAN CAIN, J., joined.

Paul G. Summers, Attorney General and Reporter, and Russell T. Perkins, Deputy Attorney General, Nashville, Tennessee, for Appellant, the State of Tennessee.

William B. Jakes, III, Nashville, Tennessee, for Appellees.

OPINION

This is the second appeal in this case, which had begun when the State of Tennessee brought an action against defendants alleging that defendants violated the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.*, and the Tennessee Health Club Act, Tenn. Code Ann. § 47-18-301 *et seq.*

The State alleged that defendant, Travis Thompson, and/or Thompson Enterprises, LLC., operated Gold's Gym without a valid certificate of registration from the State. The State sought "reasonable cost and expenses of the investigation and prosecution of the defendant's action, including attorney's fees as provided by Tenn. Code Ann. § 47-18-108(b)" and that "any consumer or other person" who suffered ascertainable losses as a result of the alleged violations be reimbursed. Further, that defendants be required to pay civil penalties as provided in Tenn. Code Ann. § 47-18-

108(b).

The case proceeded to trial in February of 2001, and at the close of the State's proof, the Trial Court directed a verdict for the defendants on the claims that had not already been dismissed on summary judgment. Judgment was entered against defendant on the count which they admitted from the beginning, i.e., the club was operating for approximately three months in violation of the Tennessee Health Club Act, which is a per se violation of the Tennessee Consumer Protection Act. Each defendant was assessed a fine of \$1,000.00 for that violation.

The State was awarded \$1,490.40 for its pre-litigation fees and expenses for its investigating and bringing Defendants into compliance with the statute.

The Defendants were awarded \$848.00 in costs pursuant to Tenn. R. Civ. P. 68, offer of Judgment, and defendants moved for attorney's fees pursuant to the Equal Access to Justice Act, Tenn. Code Ann. §29-37-104. The Trial Court then found that "the plaintiff's claim against the defendants for ascertainable loss to consumers was unsupported by substantial evidence" and that the bulk of defense counsel fees was generated in defending the restitution claim. The Court awarded \$10,000.00 to defendants, finding that "fees incurred by the defendants easily exceed the maximum recovery of \$10,000.00 authorized by Tenn. Code Ann. § 29-37-104".

The State appealed *inter alia* the award of attorney fees, arguing that (1) the defendants were not prevailing parties under the statute, (2) that it was not a "state agency" as defined in the Act, and (3) that the trial court erred in holding the State actions were not supported by substantial evidence. On appeal, this Court essentially affirmed the Trial Court's Judgment. However, the State did prevail on the issue of whether it could pursue remedies under the Health Club Act. The Trial Court had held that the State could only proceed under the Consumer Protection Act. *State v. Thompson, et al.*, No. M 2001-02354-COA-R3-CV, 2003 WL 1442417 at *6-7 (Tenn. Ct. App. Mar. 20, 2003) (No Tenn. R. App. P. 11 application filed).

This Court affirmed "the award of attorney's fees and costs to Thompson", and then said, "The decision of the Trial Court is affirmed in part and reversed in part . . . costs are taxed one-half to the appellant, State of Tennessee, and one-half to the appellees, Travis Thompson, individually and doing business as Thompson Enterprises, LLC, and the Gold Gym, and Thompson Enterprises, LLC, a Delaware limited liability company, doing business as Gold's Gym, for which execution may issue if necessary." *State v. Thompson, et al.*, 2003 WL 1442417 at *9.

On remand, the defendants moved for and the Trial Court granted an additional award of attorney fees for services incurred on appeal in the amount of \$10,000.00. As grounds for the Motion, defendants contended that the statutory cap had not been exceeded with the first award of \$10,000.00 because there were two "small businesses" as defined in the Act. However, the Trial Court found that the Act authorized additional fees where the appellate process is utilized, and the Order granting the additional fees provided that the additional amounts were permitted "due to an appeal of the case." Post-judgment interest in the approximate amount of \$1,700.00 was also

assessed against the State.

In this appeal, the State argues that the second award of fees and post-judgment interest violate the State's sovereign immunity, because there is no provision for such awards in the Equal Access to Judgment Act, or because it results in a total recovery that exceeds the statutory cap. Further, that the additional award exceeds the statutory caps because there was only one small business; and the Trial Court had no jurisdiction to award fees for work performed in the Court of Appeals because the additional fee is barred by either *res judicata* or the law of the case doctrine.

Issues of statutory construction are questions of law subject to *de novo* review on appeal with no presumption of correctness. *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000); *Eastman Chemical Co. v. Johnson*, 151 S.W.3d 503, 506 (Tenn. 2004). This rule also applies to issues of subject matter jurisdiction. *Southwest Williamson County Cmty. Ass'n. v. Saltsman*, 66 S.W.3d 872, 876 (Tenn. Ct. App. 2001).

Under the doctrine of sovereign immunity, the sovereign and political subdivisions may only be sued with the consent of the government, and upon the terms and conditions it establishes. *Bailey v. City of Knoxville*, 113 F. Supp. 3, 6 (E.D. Tenn. 1953); *Moore v. Tate*, 11 S.W. 935, 939 (Tenn. 1889). Authority to waive sovereign immunity derives from the Tennessee Constitution which provides that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Tenn. Const. Art. I, § 17. Statutes enacted to waive sovereign immunity must do so in "plain, clear, and unmistakable terms," being in clear derogation of the common law and requiring strict construction. *See generally, Doyle v. Frost*, 49 S.W.3d 853, 858 (Tenn. 2001); *State v. Cook*, 106 S.W.2d 585, 860, 861 (Tenn. 1937).

As an initial matter, the State insists that the civil proceeding involved herein is not within the ambit of the Equal Access to Justice Act (hereafter "EAJA" or the "Act."). However, it offers no authority in support of this contention. The plain language of the statute renders the facts of this case subject to the Act. The Act states:

(a)(1) Unless otherwise provided by law, the court having jurisdiction *over the civil action brought by a state agency* or over an action for judicial review brought pursuant to § 4-5-322, may award reasonable and actual fees and other expenses not to exceed ten thousand dollars (\$10,000) to the prevailing party unless the prevailing party is a state agency.

Tenn. Code Ann. § § 29-37-104 (emphasis added).

The Court erred in awarding additional attorney's fees upon remand. While the defendants did not appeal the initial ruling, they could arguably claim additional attorney's fees upon remand. *See, Chaille v. Warren*, 689 S.W.2d 173, 178 (Tenn. Ct. Appeal 1985). However, the Trial Court entered judgment to the extent of the statutory cap initially, and had observed that defendants had incurred attorney's fees in excess of the award which she allowed.

Defendants argue that they are entitled to the award of post-judgment interest made by the Trial Court, upon remand, and rely upon *Lucius v. City of Memphis*, 925 S.W.2d 522, 524 (Tenn. 1996), and *Austin v. State*, 831 S.W.2d 789 (Tenn. Ct. App. 1991). In *Lucius*, a case arising under the Tennessee Governmental Tort Liability Act (“GTLA”), the Supreme Court acknowledged the mandate contained in § 47-14-122 requires that “[i]nterest *shall* be computed on every judgment.” *Lucius* held that the general interest statute is applicable to governmental entities, concluding that the legislature’s failure to explicitly state that a particular statute (here, the post-judgment interest statute) is applicable to the government does not mean that the statute wouldn’t apply. Applying *Lucius*, this Court has held that governmental entities are subject to discretionary costs. See, *Hollifield v. City of Morristown*, 1996 WL 539766 (Tenn. Ct. App. 1996); *Cox v. Anderson County Hwy Dep’t*, 2000 WL 250126 at *8-9 (Tenn. Ct. App. 2001) (also holding that awards for costs in GTLA cases may not exceed the statutory ceiling).

It is apparent that when the legislature enacted the EAJA in 1984, it was presumed to have had knowledge of or was aware of the post-judgment interest statute enacted in 1979. It chose not to exclude the Act from the operation of § 47-14-122. This construction harmonizes the legislative intent and policy considerations underlying each statute, while remaining faithful to the statutory language.

The State relies upon the case of *Erwin v. Rose*, 980 S.W.2d 203 (Tenn. Ct. App. 1998), a GTLA case wherein the Court held that post-judgment interest may not be collected where the judgment is already at the statutory maximum. *Erwin* acknowledged the holding of *Lucius* but distinguished it because it did not involve a judgment that was at the statutory ceiling. Subsequently, the Supreme Court has followed the rule in *Erwin* in the *City of Germantown*, 31 S.W.3d 234 (Tenn. 2000), also this Court in *Shaffer v. Shelby County*, 2002 WL 54389 at *10 (Tenn. Ct. App. 2002). The “EAJA” is subject to the Post-Judgment Interest Act, but the initial award by the Trial Court exhausted the statutory cap, which by terms of the Statute include post-judgment interest. See, Tenn. Code Ann. § 29-37-104(a)(1). Accord: *City of Germantown* and *Shaffer*. Other matters raised by appellees are without merit under the law of the case doctrine and could have been raised in the first appeal. See, *Hawkins v. Hart*, 86 S.W.3d 523 (Tenn. Ct. App. 2001).

We reverse the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Thompson Enterprises, LLC, and Travis Thompson.

HERSCHEL PICKENS FRANKS, P.J.